Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1994

NISSEI ASB COMPANY,

Petitioner,

v.

FMT CORPORATION, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition raises the question of how Rule 4(a)(4) of the Federal Rules of Appellate Procedure, which extends the time to file an appeal pending the determination of post-trial motions, applies in a patent infringement case where liability and damages have been tried separately. Despite the seemingly clear language of the rule, this Court's holding in *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47 (1943), and its own precedent, the United States Court of Appeals for the Federal Circuit held in this case that an order determining liability is a "final" judgment on that issue and, accordingly, that post-trial motions addressed to liability, though filed within ten days of the final judgment awarding damages, did not extend the time to appeal from that final judgment.

PARTIES TO PROCEEDINGS

Petitioner is Nissei ASB Company ("**Nissei**").

(All parent companies and subsidiaries (except wholly owned subsidiaries) are as follows: Nissei ASB Machine Co., Ltd., a Japanese corporation.)

Respondent is FMT Corporation, Inc. ("**FMT**").

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Federal Circuit with respect to which review is sought are unpublished and not officially reported. The opinions were issued on May 20, 1994 and on March 13, 1995. A copy of each of the opinions is included in the Appendix as Exhibits "A" and "B," respectively.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1254(1) (1988) in that it seeks review by writ of certiorari of the order of the United States Court of Appeals for the Federal Circuit, dated May 20, 1994, limiting the issues raised on Nissei's appeal to that court to exclude all issues relating to damages, and from its subsequent order, dated March 13, 1995, denying Nissei's Petition for Rehearing and Suggestion for Rehearing In Banc. This petition is timely, pursuant to Supreme Court Rule 13.4, in that it was filed within 90 days of the Court of Appeals' order denying Nissei's Petition for Rehearing.

STATUTORY PROVISIONS INVOLVED

1. Federal Rule of Appellate Procedure 4(a)(4)(E) and (F):

> (4) If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Federal Rules of Civil Procedure:
>
> * * *
>
> (E) for a new trial under Rule 59; or
>
> (F) for relief under Rule 60 if the motion is served within 10 days after the entry of judgment.

2. Federal Rule of Civil Procedure 59(b):

> (b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

STATEMENT OF THE CASE

This is a patent infringement case in which the issues of liability and damages were bifurcated for purposes of trial. After an "interlocutory" judgment was entered against Nissei, and affirmed on appeal by the Federal Circuit Court of Appeals, *FMT Corp. v. Nissei ASB Co.*, 5 F.3d 1504 (Fed. Cir. 1993) (table decision), but before the final determination of damages, Nissei learned that a deposition had been taken in another action which established that machinery embodying the patents-in-suit had been offered for sale in the United States more than a year before the patents had been filed thus rendering the patents invalid under section 102(b) of the Patent Act, 35 U.S.C. § 102(b) (1988). Based on this newly discovered evidence, Nissei promptly moved in the district court to vacate the liability judgment.

While that motion was pending, on October 5, 1993, the district court entered its final judgment terminating the litigation and awarding damages against Nissei and in favor of FMT. In order to assure that its right to appeal would be preserved, Nissei thereupon filed within ten days of the final judgment new motions to vacate the judgment under both Rules 59 and 60(b) of the Federal Rules of Civil Procedure. On December 21, 1993, the district court denied all of Nissei's post-trial motions on

the ground that they were untimely, in that they had not been made within one year of the initial liability judgment.

Within thirty days of the district court's December 21, 1993 order denying Nissei's post-judgment motions, Nissei filed its notice of appeal seeking review of both the final judgment awarding damages and the denial of its post-trial motions. FMT thereupon moved in the Court of Appeals to dismiss the entire appeal as untimely. Treating the issue as one of first impression, the Court of Appeals denied FMT's motion with respect to the order denying post-trial relief but granted the order with respect to the final judgment on damages, thus limiting Nissei's appeal solely to the availability of post-trial relief from the liability judgment.

The Court of Appeals' principal rationale for that decision was its conclusion that the district court's original judgment determining liability was "final" with respect to liability issues. Thus, it held that the motions seeking to vacate that determination had to be brought within ten days of the determination of liability to extend the time to appeal. The court buttressed its conclusion by invoking the "law of the case" doctrine, stating that its prior affirmance of the liability determination limited Nissei's right to seek to reopen that determination at a later date. Since Nissei's motions related only to liability, the court concluded that they were "untimely" and did not toll Nissei's time to appeal the damages judgment, even though they were indisputedly made within ten days of the entry of that judgment. The Court of Appeals stated:

> However, Nissei may not seek review of the damages judgment because it failed to timely appeal therefrom. Nissei's argument that the 1992 liability judgment was 'interlocutory' and thus that its 'R.59' motion for a new liability trial was timely is misplaced. After this court affirmed the district court's liability judgment, this court's decision was the law of the case on liability issues.

May 20, 1994 order, Appendix A, at 3.

In compliance with the May 20, 1994 order, Nissei limited its further briefs and argument in the appeal to the issues raised by the district court's denial of its Rule 60(b) motions to reopen the liability judgment. On January 12, 1995, the Federal Circuit issued a per curiam opinion which reads, in its entirety, as follows:

> [District] Judge Tidwell did not have the benefit of *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573, 31 U.S.P.Q.2d 1001 (Fed. Cir. 1994) at the time he ruled. That case makes clear that the judgment below was not final until October 5, 1993. Therefore, the Rule 60(b)(2) motion was timely and should have been heard. Accordingly, the December 21, 1993 order denying consideration of Nissei's motion under Rule 60(b)(2) is reversed and the case is remanded for consideration of the motion on its merits.

Thus, in contrast to its original May 20, 1994 order, the Court of Appeals ultimately recognized that the district court's April 1992 liability decision was *not* a final order and that no final order was entered until the October 5, 1993 judgment awarding damages. As a result, Nissei was held to be entitled to a consideration, on the merits, of its

motion to reopen the original liability judgment but was still denied any appellate review on the issue of damages.

On January 25, 1995, Nissei timely filed a Petition for Rehearing and Suggestion for Rehearing In Banc asking the Court of Appeals to apply the rationale articulated in its January 12, 1995 decision to its previous May 20, 1994 order and to recognize that Nissei's post-trial motions, brought within ten days of the entry of the final judgment, were effective to toll Nissei's time to appeal from the issues raised in that October 5, 1993 judgment. However, by order dated March 13, 1995, the Court of Appeals denied Nissei's petition.

REASONS FOR GRANTING THE WRIT

The effect of the Court of Appeals' May 20, 1994 order was to create a special rule in bifurcated patent cases which renders the extension of the time to appeal a post-trial motion dependent upon the issues raised in the motion. If the motion relates only to liability, it does not extend the time to appeal the final judgment awarding damages and the litigant is required to file two separate appeals in order to preserve its full right of review.

The decision below is inconsistent with both the express language of and the policy behind Rule 4(a)(4) of the Federal Rules of Appellate Procedure, which has been recently amended to provide that the time to appeal a final judgment begins to run from the denial of all post-trial motions made within ten days of the entry of judgment and which is designed to assure, to the extent possible, that all aspects of a case should be consolidated

in a single appeal and to reduce procedural traps for unwary litigants.

Furthermore, the rationale of the decision – that the initial determination of liability is a "final" judgment on that issue – directly conflicts with this Court's decision in *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1, 47 (1943), that an interlocutory liability decision in a bifurcated patent infringement action does *not* become "final" until the entry of judgment after the damages phase. This principle was expressly recognized and applied by the Federal Circuit Court of Appeals in its recent decision in *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573 (Fed. Cir.), *cert. denied*, 115 S. Ct. 582 (1994) and, indeed, in its ultimate holding on the portion of the appeal it considered in this very case. The Federal Circuit's failure to follow *Marconi Wireless* also puts it in conflict with the decisions of other federal courts of appeal on this issue.

The Court of Appeals' May 20, 1994 invocation of the "law of the case" doctrine to justify its conclusion also conflicts with clear precedent of this Court regarding the nature and applicability of that doctrine. Whether or not its affirmance of the original liability judgment "was the law of the case on the liability issues" (May 20, 1994 order, Appendix A, at 3; *but see, e.g., Whimsicality v. Rubie's Costume Co.*, 836 F. Supp. 112, 116 (E.D.N.Y. 1993)), numerous Supreme Court precedents establish that the law of the case doctrine merely directs a court's discretion but does not limit its power or obligation to consider issues. *See, e.g., Arizona v. California*, 460 U.S. 605, 618 (1983).

I. RULE 4(a)(4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPLIES TO NISSEI'S APPEAL AND DICTATES THAT ITS NOTICE OF APPEAL WAS TIMELY

In 1979 this Court adopted Rule 4(a)(4) of the Federal Rules of Appellate Procedure to provide that a party's time to appeal a final judgment did not begin to run until the disposition of various post-trial motions, including motions for a new trial under Rule 59 of the Federal Rules of Civil Procedure. Rule 4(a)(4) also provided that "[a] notice of appeal filed . . . before [the] disposition of any of the above motions" shall have no effect.

The purpose of this rule, as stated by the Advisory Committee, is to eliminate the need for separate appeals from a judgment and post-trial motions which might affect that judgment, thus simplifying the practice for litigants and promoting judicial economy:

> [I]t would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. . . . Further, since a notice of appeal filed before the disposition of a post-trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

Fed. R. App. P. 4(a)(4) advisory committee's note to 1979 amendments (subdivision (a)(4)).

On December 1, 1993, Rule 4(a)(4) was amended to add motions for relief under Rule 60 to the list of motions

tolling the time to appeal "if the motion is served within ten days after the entry of judgment." Fed. R. App. P. 4(a)(4)(F). The more recent amendment was intended to strengthen the underlying principle of the rule by extending it to all motions which might have the effect of vacating or altering a judgment and by eliminating the need to engage in the sometimes difficult task of distinguishing between a motion under Rule 59 and Rule 60. *See* Fed. R. App. P. 4(a)(4) advisory committee's note to 1993 amendment.[1]

The rule adopted by the Court of Appeals in this case is not only inconsistent with the language of Rule 4(a)(4) but runs directly contrary to its underlying policy. The grant of a motion to vacate a determination of liability will have the same potential effect on a pending appeal from a final judgment awarding damages as a motion which addresses only issues related to damages; in either case, the motion has the potential of vacating or substantially altering the final judgment. It would be pointless, wasteful and directly inconsistent with the express policy embodied in Rule 4(a)(4) to permit, let alone require, the

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[1] Although the 1993 amendment to Rule 4 makes it unnecessary to reach the question, Nissei's post-judgment motion was properly brought under Rule 59, rather than Rule 60(b). A party's right to seek relief based on newly-discovered evidence under Rule 60(b)(2) does not even come into play unless the new evidence "by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Thus, if a party is aware of new evidence in time to seek relief under Rule 59, it should do so rather than involving Rule 60(b)(2). *See* 6A James W. Moore, *Moore's Federal Practice* ¶ 59.17, at 59-317 (2d ed. 1995); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2812, at 86-87 (1973).

appeal from the final judgment to proceed while post-trial motions relating to liability are still pending.

Yet, that is precisely the effect of the decision below. If the decision is permitted to stand, litigants in patent infringement cases which are bifurcated (a common practice in such cases) who make post-trial motions addressed to liability issues will be required to separately appeal the final judgment on damages while their motions are pending if they wish to preserve their right to appeal from the final judgment. Fees will be paid, briefs filed and appeals may even be argued and decided by the court of appeals, while the district court is still considering whether or not the underlying determination of liability upon which the whole judgment is premised should stand or fall. This is precisely the situation that Rule 4(a)(4) was intended to prevent, and there is no reason why it should not be applied on its terms.

II. THE COURT OF APPEALS IGNORED CONTROLLING SUPREME COURT PRECEDENT IN HOLDING THAT NISSEI'S RULE 59 MOTION, FILED WITHIN TEN DAYS OF THE DISTRICT COURT'S FINAL JUDGMENT, WAS UNTIMELY AND DID NOT TOLL THE TIME TO FILE A NOTICE OF APPEAL

A. The Supreme Court Has Clearly Held That a Liability Judgment in a Bifurcated Patent Infringement Case is Merely Interlocutory and Does Not Constitute a Final Judgment

The expressed rationale for the decision of the Court of Appeals was its assumption that "the district court's

April 2, 1992 liability judgment was final for purposes of appeal." May 20, 1994 order, Appendix A, at 6. From this it concluded that Nissei's Rule 59 motion addressed to that judgment "was untimely and did not toll the appeal period." *Id.* The Court of Appeals' conclusion that the liability judgment was "final" is directly contrary to Supreme Court precedent and fails to recognize the crucial distinction between appealable interlocutory orders and final judgments terminating litigation.

In *Marconi Wireless Telegraph Co. v. United States*, 320 U.S. 1 (1943), this Court expressly recognized that, even though a liability judgment in a bifurcated patent case is appealable under what is now 28 U.S.C. § 1292(c) (1988), it is not "final" for purposes of the availability of post-trial relief. In reversing the trial court's refusal to consider new evidence relating to liability during the damages phase of a case, this Court held:

> Although the interlocutory decision of the Court of Claims on the question of validity and infringement was appealable, as are interlocutory orders of the district courts in suits to enjoin infringement [citing to the predecessor statute of 28 U.S.C. § 1292(c)], the decision was not final until the conclusion of the accounting. Hence the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case.

Id. at 47 (citations omitted). *See also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 746 (1976) (in enacting 28 U.S.C. §§ 1291 and 1292, Congress made provision for appeal of orders which are not " 'final decision[s]' "); *Johns-Manville Corp. v. Guardian Indus. Corp.*, 116 F.R.D. 97, 100 (E.D.

Mich.) (citing the language of *Marconi Wireless* quoted above, to hold that "[t]he fact that a liability judgment may be appealed pursuant to 28 U.S.C. § 1292(c)(2) does not alter its interlocutory character"), *appeal dismissed on other grounds*, 835 F.2d 871 (Fed. Cir. 1987).

Recognizing this, cases from other circuits have been virtually uniform in holding that an interlocutory judgment on liability in a bifurcated case *does not* trigger the ten-day time limit for filing a Rule 59 motion which might involve or relate to that liability judgment. *See, e.g., Warner v. Rossignol*, 513 F.2d 678, 684 n.3 (1st Cir. 1975) ("We do not accept plaintiff's contention that a new trial motion with respect to liability had to be filed within ten days of entry of the interlocutory judgment . . . . 'The judgment' referred to in Fed. R. Civ. P. 59(b) is the final judgment that will be entered after damages are assessed."); *Garrett v. Blanton*, No. 89-4367, 1993 WL 17697, at *3 (E.D. La. Jan. 20, 1993) (interlocutory ruling in liability phase of bifurcated case did not constitute final judgment for purposes of Rule 59); *Manos v. Trans World Airlines, Inc.*, 324 F. Supp. 470, 488 (N.D. Ill. 1971) (ten-day time limits in Rule 59(b) and (e) do not apply to interlocutory judgment following liability decision in bifurcated case). The Court of Appeals' decision in this case squarely conflicts with this line of well-established precedent, thus further compelling review by this Court.

Indeed, shortly after it issued its May 20 order, but before its denial of rehearing, the Federal Circuit Court of Appeals itself relied upon *Marconi Wireless* as controlling authority to hold that an interlocutory liability judgment in a bifurcated patent infringement case does not become final until the entry of the damages judgment concluding

the litigation. In *Mendenhall v. Barber-Greene Co.*, 26 F.3d 1573 (Fed. Cir.), *cert. denied*, 115 S.Ct. 582 (1994), decided less than three weeks after the Court of Appeals' May 20, 1994 order in this case, another panel of the Federal Circuit held that, because an interlocutory liability judgment does not end the litigation on the merits, the "provision for interlocutory appeal [under section 1292(c)(2)] does not render a district court decision on fewer than all issues in the case a 'final' decision." *Id.* at 1581 (citing *Marconi Wireless*).

Finally, and perhaps most ironically, the panel in this very case, relying on *Mendenhall* as controlling authority, reversed the holding of the district court that Nissei's post-trial motion was untimely under Rule 60(b) because it was filed more than a year after the entry of the judgment on liability. Thus, the very same panel in the very same case has held, for no articulated or explicable reason, that even though the district court committed reversible error when it held that Nissei's Rule 60(b) motion was untimely, the panel still considered Nissei's post-trial motions to be untimely for purposes of extending Nissei's time to appeal from the final judgment on damages.

B. The May 20, 1994 Order Ignored Supreme Court Precedent Regarding the Law of the Case Doctrine In Applying It, Apparently for the First Time Ever, to Determine the Timeliness of a Post-Judgment Motion

In what is apparently the first decision of its kind by this or any other federal court, and directly in the face of controlling Supreme Court precedent to the contrary, the

Court of Appeals also misapplied the law of the case doctrine to support its holding that a motion for new trial under Rule 59, made within ten days of the final damages judgment in a bifurcated case, did not toll the time to file a notice of appeal from that final judgment. Because this Court has repeatedly held that the law of the case doctrine does not limit a court's *power* or *jurisdiction* to reconsider a previously decided issue, the Court of Appeals' decision is plainly wrong. Moreover, it constitutes a dangerous extension of the law of the case rule which merits review by this Court.

The law of the case doctrine is based upon the need for judicial economy and provides that a court will not generally revisit an issue once decided in the litigation. However, while "courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish." 18 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4478, at 789 (1981). This Court has repeatedly made clear that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messinger v. Anderson*, 225 U.S. 436, 444 (1912). *See also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (citing *Messinger*); *Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power.").

Moreover the law of the case doctrine is totally inapplicable where, as here, a litigant is raising new matters which have never previously been considered and passed upon by the court. Yet, that is precisely what the May 20

order does: by invoking the law of the case doctrine in a manner contrary to Supreme Court precedent, the Court of Appeals has prevented Nissei from presenting issues *never previously reviewed* by any court.

The Court of Appeals apparently reached this unprecedented result by concluding that the law of the case doctrine retroactively transformed an otherwise interlocutory liability order of the district court into a "final" order, which rendered the district court powerless, or without jurisdiction, to hear an otherwise timely Rule 59 motion filed within ten days of the final judgment. However, no case cited in the Court of Appeals' May 20 order makes, or even hints at, such a result, nor has Nissei located any other federal case from any jurisdiction so holding. In fact, the only case Nissei has located involving this particular procedural situation expressly held that a Rule 59 motion challenging a previous decision on patent validity and liability, which had been affirmed on interlocutory appeal, filed within ten days of the final damages judgment did effectively toll the time for filing a notice of appeal from that judgment. *See Bros Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 600-01 (5th Cir. 1963).

This Court's precedents establish that the law of the case doctrine serves only to guide the district court's discretion in deciding whether to reconsider the merits of a previous decision which has been affirmed on appeal in an earlier phase of the same litigation. Even if (contrary to fact) that was the purpose of Nissei's post-trial motions, Nissei was still entitled to request such reconsideration and its motion for such relief would not be ineffective to extend the time to appeal from a judgment.

On the contrary, it is well established that even a totally meritless motion is still effective, under Rule 4(a)(4), to extend the time to appeal. *See* 6A James W. Moore, *Moore's Federal Practice* ¶ 59.09[4], at 59-243 (1994).

In this case, moreover, Nissei's post-trial motions were premised entirely on its discovery of new evidence *after* the liability trial and interlocutory appeal. There was no issue raised in the motions which was previously considered by the district court or the Court of Appeals and the "law of the case" doctrine thus was patently inapplicable, as recognized even in the very decisions relied upon by the Court of Appeals here. *See Central Soya Co. v. Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983) (law of the case doctrine should not apply where " 'the evidence on a subsequent trial was substantially different' ") (quoting *Moore's Federal Practice* ¶ 0.404[1] (1983)); *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517, 521 (Ct. Cl. 1979) (expressly recognizing the "substantially different evidence exception").

To the extent the Court of Appeals may have been motivated in its decision by a desire to discourage litigants from using post-trial motions to raise issues which it has already decided, it chose a curious procedural instrument to accomplish that end; the decision below did not have the effect of preventing Nissei from relitigating anything it argued in the prior appeal. Quite the contrary, it was only the attack on the liability judgment which Nissei was permitted to appeal; it was the appeal from the judgment on damages, which had *never* previously been reviewed or considered by the Court of Appeals, that was precluded by the court's decision.

In sum, the decision below is directly inconsistent with and, if permitted to stand, will frustrate the purpose of Rule 4(a)(4) of the Federal Rules of Appellate Procedure. It is premised upon reasoning which is directly contrary to established precedents of this Court and other courts of appeal and which was expressly rejected by the Federal Circuit itself in at least two subsequent decisions – including its ultimate holding in this very case. Yet its result has been reaffirmed. As the only decision directly on point by the only court with jurisdiction to hear appeals in patent infringement cases, it stands as a uniquely important precedent which merits this Court's consideration and review.

CONCLUSION

For all of the above reasons, Petitioner Nissei ASB Company respectfully requests that its Petition for Writ of Certiorari be granted.

Dated: June 12, 1995.

Respectfully submitted,

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EXHIBIT A

(Filed May 20, 1994)

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

United States Court Of Appeals
for the Federal Circuit

94-1173

FMT CORPORATION, INC.,

Plaintiff-Appellee,

v.

NISSEI ASB COMPANY,

Defendant-Appellant.

ON MOTION

Before RICH, MICHEL, and PLAGER, *Circuit Judges.*

RICH, *Circuit Judge.*

ORDER

FMT Corporation, Inc. moves to dismiss "portions" of Nissei ASB Company's appeal as untimely and requests an award of attorney fees under Fed. R. App. P. 38. We treat FMT's motion as a motion to limit review on appeal to certain specified issues. Nissei opposes.

This matter stems from FMT's action against Nissei for patent infringement in the United States District Court for the Northern District of Georgia. On April 2, 1992, the district court issued an order and judgment holding FMT's patents not invalid, finding Nissei

infringed, and enjoining Nissei from further infringement. Nissei appealed and this court affirmed. *FMT Corp. v. Nissei ASB Co.*, No. 92-1337, -1357 (Fed. Cir. Aug. 2, 1993).

Meanwhile, the damages case proceeded in the district court. After a trial on damages before a special master, but before a final judgment had been entered, Nissei filed a Fed. R. Civ. P. 60(b) motion requesting the district court to reopen its April 2, 1992 liability judgment as it related to validity. On October 5, 1993, judgment was entered assessing $1.6 million in damages against Nissei. Nissei did not notice an appeal from the damages judgment. Nissei renewed its R. 60(b) motion or, in the alternative, moved under "Fed. R. Civ. P. 59" for a new trial on liability based on the asserted new evidence that was the basis for its R. 60(b) motions.

On December 22, 1993, the district court denied Nissei's R. 60(b) motion. The district court noted that the April 1992 liability judgment was a final judgment and, thus, refused to consider Nissei's arguments based on R. 59.* The district court also granted FMT's motion for attorney fees associated with Nissei's "Rule 60 and Rule 59 motions and renewal motions."

On January 20, 1994, Nissei filed a notice of appeal seeking review of the October 5, 1993 damages judgment, of "all prior orders in this action," and of the December

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* Under R. 59, a motion for a new trial must be served not later than 10 days after the entry of judgment. In this case, Nissei's R. 59 motion was filed 18 months after the liability judgment.

22, 1993 order denying its R. 59 and R. 60(b) motions and awarding attorney fees.

FMT argues that Nissei may not seek review of the October 5, 1993 damages judgment or any matters related thereto because Nissei failed to file a notice of appeal within 30 days of the damages judgment. FMT argues that Nissei's "R. 59" motion for a new liability trial was not a timely R. 59 motion that would toll the time for filing a notice of appeal under Fed. R. App. P. 4(a). In response, Nissei argues that the April 2, 1992 liability judgment was interlocutory, that no final judgment was entered until the October 5, 1993 damages judgment, and, thus, that the R. 59 motion (filed within 10 days of the damages judgment) tolled the time for appeal until 30 days after the district court denied the motion.

Nissei has timely appealed and may seek review only of the district court's denial of its R. 60(b) motion and the award of attorney fees against it. The denial of a R. 60(b) motion is appealable. *See Browder v. Director, Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1977); *Ashland Oil, Inc. v. Delta Oil Products Corp.*, 806 F.2d 1031 (Fed. Cir. 1986). However, Nissei may not seek review of the damages judgment because it failed to timely appeal therefrom. Nissei's argument that the 1992 liability judgment was "interlocutory" and thus that its "R. 59" motion for a new liability trial was timely is misplaced. After this court affirmed the district court's liability judgment, this court's decision was the law of the case on the liability issues.

The law of the case doctrine "expresses the practice of the courts generally to refuse to reopen what has been

decided." *Central Soya Co. Inc., v. Geo. A. Hormel & Co.*, 723 F.2d 1473, 1580 (Fed. Cir. 1983). *United States v. Turtle Mountain Band of Chippewa Indians*, 612 F.2d 517 (Ct. Cl. 1979) is instructive. In that case, the United States had previously appealed a liability determination, which the Court of Claims affirmed. After a damages award of $52 million, the United States appealed again. In the context of the second appeal, the United States sought review of certain liability rulings. Our predecessor court stated:

> The provision in the Indian Claims Commission Act that permitted appeals to this court from "any interlocutory determination by the Commission establishing the liability of the United States" (25 U.S.C. § 70s(b) (1976), confirms the soundness of treating the decision in such an appeal as the law of the case. The provision was designed to give the parties before the Commission the opportunity to avoid the time and expense involved in litigating questions relating to the amount of recovery until the liability of the United States was definitively determined. Having chosen to seek interlocutory review of the Commission's determination of the date of extinguishment of aboriginal title, the government should not be permitted a second chance to litigate that question because it is dissatisfied with the outcome of the first appeal. To permit such relitigation would frustrate the basic policy of the interlocutory appeals provision of the Indian Claims Commission Act.
>
> We have applied the law-of-the-case doctrine to preclude Indian Tribes from relitigating an issue determined against them in an interlocutory appeal. *Three Affiliated Tribes of the Fort Berthold Reservation v. United States*, 204 Ct. Cl.

831, *cert. denied*, 419 U.S. 901, 95 S.Ct 185, 42 L.Ed.2d 147 (1974). We follow the same practice here with respect to the United States.

> The government contends, however, that the prior decision is not the law of the case because it was rendered in an interlocutory appeal. As we have just seen, however, that argument is inconsistent with the purpose and concept of the interlocutory review provision of the Indian Claims Commission Act. Moreover, it is a common practice in this court first to determine liability and then to remand the case to the trial division for computation of damages. Issues fully resolved at the liability stage are not open for reargument in later stages. *See e.g., Trans Ocean Van Service v. United States*, 470 F.2d 604, 200 Ct. Cl. 122 (1972); *Gearinger v. United States*, 412 F.2d 862, 188 Ct. Cl. 512 (1969). The general rule, in fact, is that "once affirmed on appeal, . . . an [interlocutory] order loses its interlocutory character and becomes the law of the case." *United States ex rel. Greenhaigh v. F.D. Rich Co.*, 520 F.2d 886, 889 (9th cir. 1975). *See also National Airlines, Inc. v. International Association of Machinists & Aerospace Workers*, 430 F.2d 957, 960 (5th Cir. 1970), *cert. denied*, 400 U.S. 992, 91 S.Ct. 456, 27 L. Ed.2d 440 (1971) (issue "settled exclusively" on preliminary injunction motion is law of the case)[footnote omitted].

Turtle Mountain Band, 612 F.2d at 520-21. *See also Smith v. Vulcan Iron Works*, 165 U.S. 518, 525-26 (1897) (" . . . the merits of the case, having been once determined by the appellate court in reversing the interlocutory decree, were not open to reconsideration at a later stage of the same case, either in that court or in the court below").

Accord Trell v. Marlee Electronics Corp. 912 F.2d 1443, 1445 (Fed. Cir. 1990).

As discussed above, Nissei's argument that the liability judgment remained subject to alteration under R. 59 by the district court within the context of the damages case is incorrect. Nissei does not dispute that the district court's April 2, 1992 judgment on liability was final for the purposes of appeal pursuant to 28 U.S.C. § 1292 (c) (2). Section 1292 (c) (2) permits a party to appeal "from a judgment in a civil action for patent infringement which . . . is *final* except for an accounting" [emphasis added]. Because the district court's April 2, 1992 liability judgment was final for the purposes of appeal, Nissei's "R. 59" motion for a new liability trial, filed more than a year and half after the judgment, was untimely and did not toll the appeal period. *See Browder,* 434 U.S. at 265 (1977) (an untimely post judgment motion can not toll the running of time to appeal). Indeed, Nissei was well aware of this as evidenced by its filing of two R. 60(b) motions to reopen the liability judgment.

In sum, all that Nissei may seek review of is the district court's denial of its R. 60(b) motion and award of attorney fees.

Accordingly,

IT IS ORDERED THAT:

(1) FMT's motion to limit review is granted. Nissei's appeal is limited to review of the district court's denial of

Nissei's R. 60(b) motion and the district court's award of attorney fees.

(2) FMT's motion for attorney fees is denied.

FOR THE COURT

May 20, 1994
Date

/s/ Giles S. Rich
Giles S. Rich
Circuit Judge

cc: Alfred W. Breiner, Esq.
George L. Graff, Esq.

EXHIBIT B

(Filed March 13, 1995)

United States Court of Appeals
for the Federal Circuit

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on March 20, 1995, unless another timely petition for rehearing is filed within the time permitted by Rule 40.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: March 13, 1995 By /s/ Diane M. Frye
Diane M. Frye
Chief Deputy Clerk

cc: GEORGE L. GRAFF
ALFRED W. BREINER

FMT CORP V. NISSEI ASB CO, 94-1173
(DCT – 1:90-cv-786)

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Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

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